"HELP ME, I CAN'T GO HOME"—ALTERNATIVE REMEDIES FOR COLOMBIAN VICTIMS OF VIOLENCE WHO DO NOT QUALIFY FOR POLITICAL ASYLUM IN THE UNITED STATES

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I. INTRODUCTION

Most of the top leaders of the main guerrillas and paramilitary groups in Colombia have fallen, but the violence and the security concerns remain. Unlawful killings, kidnappings, widespread, recruitment, and use of child soldiers, extortions, rapes, forced abortions, and constant harassment continue to plague innocent farmers and cattle ranchers in the country's rural areas. These innocent citizens, who live isolated from the immediate reach of local authorities, have become an easy prey to former paramilitary members of insurgency groups like the *Armed Revolutionary Forces of Colombia* (FARC), the *National Liberation Army* (ELN), and the *United Self-Defense Forces of Colombia* (AUC). These former members have joined together and created paramilitary successor groups that employ the same *modus operandi* as their predecessors. As a result, these emerging criminal bands commit countless human rights violations daily against civilians.

Although the Colombian government has recognized that these illegal groups pose a serious threat to their citizens, the victims of these attacks often do not receive governmental protection. These criminals severely intimidate their victims and prevent them from seeking help from the police. In the event that they do, the local police's response amounts to a lack of resources to investigate allegations of violence, or an inability to offer protection from harassment or stalking. The fear of physical harm, the loss of livelihood, and the willful blindness of their own country forces many citizens to flee their homeland. The ones that overcome the dangers of entering the United States illegally and are educated enough to file asylum petitions, often do not succeed. In the majority of these cases, the victims do not meet the statutory requirements for political asylum, and consequently, do not receive asylum in the United States.

Part II of this article presents a historical analysis of the development of the insurgency conflict in Colombia. Part III provides a review of the main bilateral efforts between the United States and Colombia to combat the country's internal violence and drug war. Part IV displays an analysis of United States asylum and refugee immigration laws. Part V assesses the available alternative remedies to failed asylum petitions. Lastly, Part VI concludes this article with a summary of the issues discussed and highlights

some alternatives to political asylum available to Colombian victims of violence who do not qualify for asylum protection.

II. HISTORICAL ANALYSIS OF THE COLOMBIAN INSURGENCY CONFLICT

The insurgency conflict in Colombia is not new.[1] It dates back to a civil war that occurred during the 1940s and 1950s.[2] The lack of state control over the Colombian territory and its history of poverty and inequality as a third world country have prolonged this conflict for many decades.[3] Nonetheless, this article will focus primarily on the development of the insurgency conflict from the 1960s through the present time.

During the early 1960s, two of the major revolutionary groups involved in perpetuating this civil war were established, the FARC and the ELN.[4] These two groups were rural insurgency forces with political ideologies rooted in Communism.[5] To better illustrate the development and the impact of these paramilitary groups, this section offers a brief discussion of the main insurgency groups in Colombia since the 1960s:

a) FARC;
b) ELN;
c) AUC; and
d) BACRIM.

A. Armed Revolutionary Forces of Colombia (FARC)

In 1964, the FARC, located in the remote regions between Bogota and Cali, established itself as a rural insurgency group.[6] Their common practices included attacks on rural and urban areas, bombings, murders, kidnappings, hijackings, and extortions.[7] Their main source of income was the cultivation, taxation, and trafficking of drug crops.[8] The 1998 United States Country Report on Human Rights in Colombia reported that "paramilitary groups

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1. Whitney Drake, *Disparate Treatment: A Comparison of United States Immigration Policies toward Asylum-Seekers and Refugees from Colombia and Mexico*, 20 TEX. HISP. J.L. & POL'Y 121, 131 (2014).

2. *Id.* at 131.

3. JUNE S. BEITTEL, CONG. RESEARCH SERV., RL32250, COLOMBIA: BACKGROUND, U.S. RELATIONS, AND CONGRESSIONAL INTEREST, 1, 3 (2012) [hereinafter CRS COLOM. REP.].

4. Drake, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.* at 132.

8. *Id.*

murdered, tortured, and threatened civilians *suspected* of sympathizing with guerrillas in an orchestrated campaign . . . Similarly, guerrillas counterattacked the paramilitary by systematically murdering, torturing, and threatening civilians who were *merely suspected* of supporting the paramilitary."[9] In fact, on December 28, 1998, FARC rebels launched an attack on suspected civilian paramilitary supporters where they "tortured, decapitated, dismembered, and castrated the men, and shot the women and infants."[10]

In the early 2000s, the insurgency group experienced significant attacks to the stability of their leadership.[11] In 2003, the Colombian government launched a military campaign known as *Plan Patriota* (Patriotic Plan) to regain FARC-held territory in the country's capital, Bogota.[12] By 2005, the FARC had launched a counter-offensive attack in the eastern regions of the country and gained control of an estimated 30% of the Colombian territory.[13] However, on March 1, 2008, the then-Colombian President Alvaro Uribe authorized the bombing of a FARC camp in Ecuador which killed twenty-five rebels including Raul Reyes, the second in command in the FARC's power structure.[14] Days later, two other members of the FARC's secretariat died.[15] Ivan Rios was killed by his own security agent and Manuel Marulanda died of a heart attack.[16] However, "despite many reverses over its 48-year history, the FARC has shown a capacity to revive itself and continue to pose a serious security threat."[17]

By 2013, the United States reported in their annual Country Report on Human Rights in Colombia that the "FARC, ELN, organized criminal gangs, and common criminals continued to kidnap people, both for ransom and political reasons."[18] The report also stated that the FARC continued to kill individuals that were allegedly collaborating with government authorities or

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9. Alexandra de la Asunción, *Colombia: The Ignored Humanitarian Crisis*, 31 U. MIAMI INTER-AM. L. REV. 439, 447 (2000) (footnote omitted).

10. *Id.* at 448.

11. CRS COLOM. REP., *supra* note 3, at 15.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. CRS COLOM. REP., *supra* note 3, at 15.

17. *Id.* at 16.

18. U.S. DEP'T OF STATE. COUNTRY REP. ON HUMAN RIGHTS PRACTICES: COLOM. (2013), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (last visited Oct. 18, 2014) [hereinafter 2013 COLOM. REP.].

other rival groups.[19] For instance, on April 28, 2013, FARC rebels killed a three-year-old boy and his father, and injured eleven others, including two army soldiers, during an attack in the Arauca Department.[20] On July 20 of the same year, in Fortul, Arauca, FARC rebels killed fifteen army soldiers and wounded five others while the soldiers were washing their clothes.[21] Presently, this established insurgency group continues to actively threaten the economic and social stability of Colombian citizens.[22]

B. National Liberation Army (ELN)

In 1985, a year after the FARC was established, the ELN announced its formation as a leftist insurgency group under the leadership of Fabio Vazquez Castaño.[23] The founding members of this group were Colombian university students inspired by the political ideologies of Fidel Castro and Che Guevara.[24] The ELN typically terrorized rural civilian communities and targeted Colombia's infrastructure including roadways, bridges, water reservoirs and aqueducts, and the country's oil and electricity industries.[25] The group's main areas of operation included the north, northeast, the Middle Magdalena Valley, and the Venezuelan border.[26] Its principal sources of income included the taxation of illegal crops, extortions, criminal attacks, kidnappings for ransom, and racketeering of wealthy Colombians.[27] In the mid-2000s, the Colombian government engaged the ELN in peace talks hoping to move towards demobilization, but the talks ended when the ELN resumed violence.[28] By 2012, the ELN expressed interest in wanting to join the peace talks between the FARC and the Colombian government.[29] However, the Colombian government reported that the ELN raised their level of violence and made pacts with emerging criminal bands composed of former paramilitaries to pursue drug trafficking and other criminal

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19. *Id.* at 7.
20. *Id.*
21. *Id.*
22. 2013 COLOM. REP., *supra* note 18, at 2.
23. Asunción, *supra* note 9, at 448.
24. CRS COLOM. REP., *supra* note 3, at 18.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. CRS COLOM. REP., *supra* note 3, at 18.

activities.[30] Therefore, it is unlikely that at this point the Colombian government would welcome the ELN to peace negotiations.

C. *United Self-Defense Forces of Colombia (AUC)*

To combat the violence inflicted by the FARC and the ELN, wealthy farmers and landowners created paramilitary groups during the 1980s and the 1990s.[31] These local and regional groups later joined together to form an umbrella organization known as the AUC.[32] The *modus operandi* of these paramilitary groups was to massacre and assassinate the support networks of the guerrillas and any civilian suspected of supporting other revolutionary groups.[33] The conflict between leftist revolutionary groups, like the FARC and ELN, and right wing paramilitary groups, like the AUC, was originally of a political nature, but it later escalated to territory and drug trade disputes.[34] The AUC military practices were particularly brutal including "torture, death threats, summary executions, and forced disappearances."[35] They raised most of its revenue from drug trafficking operations.[36] By 2006, paramilitaries controlled approximately 40% of all cocaine exports in Colombia.[37] In that same year, the AUC officially ended the demobilization of 31,000 of its members and turned over approximately 17,000 weapons.[38] For the Colombian government, this surrender of personnel and weapons marked a victory in the country's long internal armed conflict.[39] However, time showed that this mobilization also marked the birth of the third generation of drug trafficking syndicates.[40]

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30. *Id.* at 19.

31. *Id.*

32. *Id.*

33. Elizabeth A. James, *Is the U.S. Fulfilling its Obligations Under the 1951 Refugee Convention? The Colombian Crisis in Context*, 33 N.C. J. INT'L L. & COM. REG. 455, 466 (2008).

34. Drake, *supra* note 1, at 132.

35. James, *supra* note 33, at 466.

36. CRS COLOM. REP., *supra* note 3, at 19.

37. *Id.*

38. *Id.*

39. Simon Romero, *Colombian Paramilitaries' Successors Called a Threat*, NEW YORK TIMES, (Feb. 10, 2010), *available at* http://www.nytimes.com/2010/02/04/world/americas/04colombia.html?_r=0 (last visited Oct. 9, 2014).

40. CRS COLOM. REP., *supra* note 3, at 20.

D. *Paramilitary Successor Groups (BACRIM)*

Not all paramilitaries surrendered and demobilized during the 2006 mobilization.[41] Some of them reorganized and joined subsequent illegal armed groups including Colombian criminal groups known as BACRIM (a Spanish acronym for "*bandas criminales*" translated as "criminal bands.")[42] Aside from paramilitaries who never demobilized, these new groups also include demobilized AUC members who returned to crime, common criminals, and narcotics traffickers.[43] These new criminal groups are "hybrid organizations, combining facets of paramilitarism with more mafia like criminal structures and operations . . . [I]n many areas they maintain the ties to the economic elites that worked side by side with the paramilitaries and continue to protect their interests."[44] They have also inherited the weapons and *modus operandi* of their predecessors.[45] Therefore, these paramilitary successor groups are unquestionably a pressing threat to Colombia's security.[46]

The United States Department of State and the United Nations have recognized that these successor groups do not openly proclaim the same political objectives of the AUC, but instead, they seem to have shifted their focus to purely criminal activities involving drug trafficking, extortion, kidnapping, and other similar crimes.[47] However, it is important to note that the current silence of these groups regarding a political agenda or a particular political philosophy does not prove its complete lack thereof.[48] There is still room for these emerging criminal groups to unite with a common political objective.

Furthermore, the level of violence of these emerging groups is of international concern.[49] According to the 2010 United Nations High Commissioner for Human Rights (UNHCHR) report, several human rights

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41. *Id.* at 19.

42. *Id.* at 20.

43. *Id.* at 19.

44. Miriam Wells, *BACRIM The Greatest Threat to Colombia Land Restitution: HRW*, INSIGHT CRIME, Sept. 19, (2013), http://www.insightcrime.org/news-briefs/bacrim-are-the-greatest-threat-to-colombia-land-restitution-hrw (last visited Oct. 17, 2014).

45. *Immigration and Refugee Board of Canada, COL104030.E*, (June 11, 2014), http://www.irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=453897&pls=1 (last visited Oct. 17, 2014) [hereinafter *Immigration and Refugee Board of Canada*].

46. CRS COLOM. REP., *supra* note 3, at 20.

47. *Id.*

48. *Id.*

49. *Id.*

groups have argued that Colombian authorities tolerate the BACRIM because of corruption, intimidation, or threats.[50] This accusation raises serious concerns regarding the Colombian government's ability to provide an effective administrative response to current human rights violations against their citizens. "The people most at risk from these abuses are those living in rural areas, specifically indigenous and Afro-descendent people, as well as peasant-farmer communities, those that live in poverty in urban areas, human rights defenders, and trade unionists."[51]

Another concerning feature of these gangs is their ability to recover quickly in spite of governmental attacks.[52] Several of these groups have been severely hit by the police through arrests and by operations of security forces, but shortly after, they have reappeared in the same location with the same name.[53] The regenerative nature of these successor groups makes it almost impossible for the Colombian government to completely dismantle them.[54]

The Organization of American States (OAS) has estimated that there are currently more than twenty-three illegal groups operating in the country.[55] Some of the most notorious BACRIM groups include the *Ubareños*, *Rastrojos*, *Ejercito Revolucionario Popular Anticomunista* (ERPAC) [Popular Revolutionary Anti-Communist Army], *Paisas*, *Aguilas Negras* [Black Eagles], *Oficina de Envigado*, and *Autodefensas Unidas de Cundinamarca* [United Self-Defense of Cundinamarca].[56] Currently, the two most ambitious, ruthless, and aggressive criminal bands are the *Urabeños*, also known as the Gaitanista Self-Defense Forces, and the *Rastrojos*.[57] On March 2013, the Colombian government stated that the *Urabeños* are the only criminal band with national presence and a rising membership of over 2000 members, which surpasses the ELN.[58] They are predominantly located

50. *Id.*

51. *Immigration and Refugee Board of Canada*, *supra* note 45.

52. James Bargent, *Small-Scale Criminal Groups Proliferate in Colombia*, INSIGHT CRIME (Mar. 17, 2014), http://www.insightcrime.org/news-briefs/small-scale-criminal-groups-proliferate-as-colombia-crime-fragments (last visited Oct. 17, 2014).

53. *Id.*

54. Jeremy McDermott, *The Future of the BACRIM and Post-Conflict Colombia*, INSIGHT CRIME (May 2, 2014), http://www.insightcrime.org/investigations/future-of-the-bacrim-and-post-conflict-colombia (last visited Oct. 17, 2014) [hereinafter *The Future of the BACRIM*].

55. U.S. DEP'T OF STATE, COUNTRY REP. ON HUMAN RIGHTS PRACTICES: COLOM. 5 (Feb. 25, 2009), http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119153.htm (last visited Oct. 17, 2014) [hereinafter 2008 COLOM. REP.].

56. *Immigration and Refugee Board of Canada*, *supra* note 45.

57. *Urabeños*, INSIGHT CRIME (March, 2010), http://www.insightcrime.org/colombia-organized-crime-news/urabenos-profile (last visited Oct. 18, 2014).

58. *Id.*

in the northwestern region of the country in the Choco and Antioquia Departments.[59] The *Urabeños* are notorious for hiring local street gangs, known as *pandillas* or *bandas*, to execute micro-trafficking operations, extortions, and assassinations.[60]

The *Rastrojos* grew out of the *Norte del Valle* drug cartel and expanded rapidly by 2006.[61] They are situated along the Colombian border with Ecuador and Venezuela.[62] Their main activities involve exportation of cocaine to international markets, coal mining, kidnappings, and extortions.[63] They operate mostly through strategic alliances with other paramilitary groups to move their product.[64] However, since their establishment, the group has experienced constant internal divisions and conflicts, which ultimately has caused them to split into several smaller cells.[65] By 2012, the *Rastrojos* had become the country's most powerful criminal gang, but the group imploded when three of its top leaders—Diego Rastrojo, Loco Barrera, and Luis Enrique—were extradited to the United States.[66] Nonetheless, the group has continued their smaller operations in Valle Del Cauca, Nariño, and Norte de Santander.[67]

By the end of 2012, these groups had forced the displacement of many citizens from the Caribbean and Pacific Coast.[68] In 2011, the BACRIM displaced a total of 11,898 people from Cordoba and Atlántico.[69] Some of the reasons given by displaced citizens included death threats, extortions, and their failed efforts to endure the BACRIM's conflict over territorial and economic control.[70] According to the United Nations High Commissioner for Refugees (UNHCR), there are currently 63,000 registered cases of forced disappearances and more than four million worldwide internally displaced Colombians since the start of this armed conflict.[71] This forced displacement

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59. *Id.*

60. *Id.*

61. *Rastrojos*, INSIGHT CRIME, http://www.insightcrime.org/colombia-organized-crime-news/rastrojos-profile (last visited Oct. 18, 2014).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Rastrojos, *supra* note 61.

67. *Id.*

68. *Immigration and Refugee Board of Canada*, *supra* note 45.

69. *Id.*

70. *Id.*

71. Drake, *supra* note 1, at 133.

has prompted thousands of citizens to seek protection across international borders.[72] But, many neighboring countries like Ecuador, Panama, and Venezuela have militarized their borders and issued deportation orders against Colombian immigrants.[73] Therefore, Colombia's internal armed conflict and the government's inability to protect their citizens from violent insurgency groups have prompted a large outpour of Colombian asylum and refugees applications to other foreign nations, including the United States.[74]

III. REVIEW OF BILATERAL EFFORTS TO COMBAT COLOMBIA'S VIOLENCE AND DRUG WAR

The justification for the United States involvement in Colombia's war on drugs and its internal armed conflict is rooted on the effects of narcotics trafficking into the United States.[75] Colombia has been the leading narcotics supplier of the United States since the 1970s.[76] "The hunger of the United States population for narcotics and the willingness of the drug cartels to succor that appetite resulted in an expansion of criminal activity affecting both countries."[77] To better illustrate the collaboration between these two countries, this section will review some of the major bilateral and international mutual assistance agreements established between the United States and Colombia from the 1940s to the 2000s.

A. Early Agreements in Criminal Matters

From the 1940s to the 1960s, two of the main agreements between the United States and Colombia were the *Inter-American Treaty of Reciprocal Assistance* and the *United States Foreign Assistance Act of 1961*.[78] The *Inter-American Treaty of Reciprocal Assistance* was signed in 1947 and it intended that signatories would pledge mutual assistance in the case of an armed attack brought about by any State signatory against an American State.[79] In addition, it sought to resolve disputes between the North, South, and Central American States favorably and under the terms established in

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72. *Id.*

73. *Id.*

74. *Id.*

75. Luz E. Nagle, *U.S. Mutual Assistance to Colombia: Vague Promises and Diminishing Returns*, 23 FORDHAM INT'L L.J. 1235, 1236 (2000).

76. *Id.* at 1239.

77. *Id.*

78. *Id.* at 1240–41.

79. *Id.* at 1240.

Articles 51 and 54 of the United Nations Charter.[80] The spirit of this treaty moved the United States Congress to pass the *United States Foreign Assistance Act of 1961*.[81] This latter act extended various types of aid, like military assistance, to amicable states.[82] This piece of legislation was intended as an "Act to promote the foreign policy, security, and general welfare of the United States by assisting people of the world in their efforts toward economic development and internal and external security, and for other purposes."[83]

B. Mutual Legal Assistance Treaties (MLAT)

During the 1970s and until the 1980s, the most relevant agreements between Colombia and the United States were the *Lockheed Aircraft Corporation Agreement* in 1976 and the *International Narcotics Control Act of 1989*.[84] These mutual legal assistance treaties allowed signatory states to collaborate in fighting transnational organized crime through evidence gathering or law enforcement assistance.[85] In particular, MLATs were intended to facilitate "service of summons, the production and certification of judgments and other court documents, searches and seizure of property, hearing witnesses, and securing and handing over evidence, documents, objects, and assets."[86]

The only current mutual assistance treaty in criminal investigation between Colombia and the United States is the *Lockheed Aircraft Corporation Agreement* signed in 1976.[87] In this agreement, both countries promised to share evidence available to them and to keep all information confidential.[88] Section 5 required them to "use their best efforts to supply evidence in such form as to render it admissible pursuant to the rules of evidence in existence in the requesting State."[89] This task proved very difficult for both countries because they had differing systems of law; the United States had a common law system while Colombia employed an

80. Nagle, *supra* note 75, at 1240.
81. *Id.* at 1241.
82. *Id.*
83. *Id.*
84. *Id.* at 1243.
85. Nagle, *supra* note 75, at 1245.
86. *Id.*
87. *Id.* at 1243.
88. *Id.* at 1244.
89. *Id.*

inquisitorial civil law system.[90] Since Colombian courts were unfamiliar with the American legal system and vice versa, the parameters of the *Lockheed agreement* were broken and never actually implemented.[91]

Given the rise of narcotics trafficking during the 1970s, the United States and Colombia implemented measures to combat the borderless crime through the *International Narcotics Control Act of 1989* (Control Act).[92] This act pledged more than $240 million in assistance to Bolivia, Colombia, and Peru to combat the war on drugs.[93] In exchange for the terms of this agreement, the countries had to pledge respect to traditional human rights standards under international law.[94] Through this act, the United States government also promised to forgive any debt owed to the country under the *United States Foreign Assistance Act of 1961*.[95]

C. *Further Mutual Assistance Agreements*

From the early 1990s to the late 2000s, several initiatives between Colombia and the United States were instituted. Some of those bilateral efforts include:

> the Declaration of Cartagena in 1990, the Mutual Assistance Agreement of 1991, the Agreement to Suppress Illicit Traffic by Sea in 1997, Counternarcotics Alliance in 1998, Customs Service Mutual Assistance Agreement of 1999, Plan Colombia in 1999, the Coverdell Proposal (The ALIANZA Act) of 1999, the 2000 White House Plan, the United States-Colombia Defense Cooperative Agreement (DCA), and the United States-Colombia Free Trade Agreement (FTA).[96]

For purposes of this article, the only initiatives discussed under this section are *Plan Colombia*, the *DCA*, and the *FTA*.

In 1999, with the help of the United States Department of State, the then Colombian President Andres Pastrana proposed a foreign policy reform between Colombia and the United States known as *Plan Colombia*.[97] This

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90. Nagle, *supra* note 75, at 1245.
91. *Id.* at 1248.
92. *Id.*
93. *Id.*
94. *Id.*
95. Nagle, *supra* note 75, at 1248.
96. *Id.* at 1236.
97. *Id.* at 1269.

$7.5 billion plan sought to "promote a comprehensive strategy to counter drug trafficking, improve the performance of the armed forces, and win the confidence of civilians."[98] Under the agreement, the International Monetary Fund (IMF) would contribute $2.7 billion; the World Bank and the Inter-American Development Bank would offer $3 billion; foreign countries altogether would pledge at least $3.5 billion; and Colombia would contribute $4 billion on their own.[99] Through the *Military Reconstruction Appropriations Act of 2001* the United States government gave Colombia $1.3 billion for counter narcotics related efforts in the country even though Congress never authorized Plan Colombia.[100] Further United States funding for the project came later through President George W. Bush's *Andean Counterdrug Program* (ACP) that funded counter narcotics efforts in Bolivia, Brazil, Ecuador, Panama, Peru, and Venezuela.[101] From 2000 to 2012, the United States gave Colombia $8 billion to fund the project.[102]

Two other relevant bilateral agreements were the *DCA* and the *FTA*.[103] The DCA treaty was signed on October 30, 2009, and it authorized the United States to access seven military facilities located in Colombia to combat narcotics and terrorism.[104] This agreement did not alter the number of deployed United States soldiers permitted on Colombian soil.[105] The FTA was first signed on November 22, 2006, but it was not officially approved until Congress implemented legislation and President Barack Obama signed it on October 12, 2011.[106] Nonetheless, the treaty did not enter into effect until May 15, 2012.[107] The FTA principally sought to "reduce and eliminate barriers to trade and investment, support democracy, and fight drug activity."[108]

Altogether, the United States and Colombia have a long history of mutual cooperation and active involvement that revolves around the curtailment of drug trafficking and the fight against Colombia's internal

98. *Id.*
99. *Id.*
100. CRS COLOM. REP., *supra* note 3, at 31.
101. *Id.*
102. *Id.* at 36.
103. *Id.* at 39-41.
104. *Id.* at 39.
105. CRS COLOM. REP., *supra* note 3, at 39.
106. *Id.* at 41.
107. *Id.* at 1.
108. *Id.* at 41.

armed conflict.[109] The United States Committee for Refugees labeled the exodus of Colombian diaspora in the 2000s as "one of the worst human crisis in the world" with an average of 680 citizens fleeing their homes daily.[110] However, none of the United States assistance plans formulated since the 1980s to the present time have properly addressed this flood of internal refugees from paramilitary controlled areas in Colombia.[111]

IV. ASSESSMENT OF UNITED STATES ASYLUM AND REFUGEE LAW

A. Historical Assessment of United States Asylum and Refugee Legislation

"For those [individuals] fleeing killings, torture, destruction of their towns or villages, and upheaval in their native lands, asylum status is a matter of life and death."[112] The United States government has long adhered to a *nonrefoulment* principle in which it promises not to return an alien to a country where his life or freedom would be threatened.[113] This principle is embodied in several pieces of United States immigration legislation and in international immigration treaties where the United States is a signatory.[114]

Prior to 1948, the United States did not have a refugee or asylum policy in place.[115] On that same year, the United States Congress enacted its first piece of legislation concerning refugee protection known as the *Displaced Persons Act*.[116] This refugee law allowed for the immigration of approximately 400,000 individuals mainly from Eastern European countries where they had been oppressed by Communist governments.[117]

In 1951, the United Nations approved a convention titled the *Geneva Convention Relating to the Status of Refugees* (the 1951 Convention) to offer

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109. Nagle, *supra* note 75, at 1235.

110. *Id.*

111. *Id.*

112. Laura Isabel Bauer, *They Beg for Our Protection and We Refuse: U.S. Asylum's Failure to Protect Many of Today's Refugees*, 79 NOTRE DAME L. REV. 1081, 1083 (2004).

113. RUTH ELLEN WASEM, CONG. RESEARCH SERV., R41753, ASYLUM AND "CREDIBLE FEAR" ISSUES IN U.S. IMMIGRATION POLICY, (June 19, 2011) [hereinafter CRS ASYLUM REP.].

114. *Id.*

115. Bauer, *supra* note 112, at 1084.

116. *Id.*

117. *Id.*

protections for refugees worldwide.[118] The 1951 Convention was the first international effort to consolidate one definition of the term "refugee."[119]

> It defined it as any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . ."[120]

The following year, the United States government passed the *Immigration and Nationality Act (INA)* which codified and organized many United States immigration provisions that were in effect during that time.[121] The INA is an independent body of law, but it is also codified in the United States Code (U.S.C.) under Title VII.[122]

In 1953, the United States Congress further advanced its protections of refugees through the *Refugee Relief Act,* and later through the *Fair Share Refugee Act* of 1960.[123] Starting in the mid-1950s through the 1970s, the United States government shifted the focus of their asylum protections from a strictly political and ideological approach to a more humanitarian one.[124] The asylum humanitarian perspective views an alien's need for protection, regardless of whether the source of his need emanates from "persecution, civil war, famine, extreme poverty, or some other source," as the grounds for a moral claim of asylum protection.[125] In fact, in 1956, the Attorney General adopted this humanitarian notion of asylum and used the parole power of his office to allow hundreds of Hungarian and Indochinese parolees into the

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118. Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 506, 508 (1993).

119. *Id.*

120. Convention Relating to the Status of Refugees, art. 1, July 28, 1951, 19 U.S.T. 6260, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

121. Immigration and Nationality Act, 8 U.S.C. § 1101 (2014).

122. *Id.* (The most relevant sections of this Act for purposes of the analysis of this article include Sections 101 (8 U.S.C. § 1101) (*Definitions*), 207 (8 U.S.C. §1157) (*Annual Admission of Refugees and Admission of Emergency Situation Refugees*), 208 (8 U.S.C. § 1158) (*Asylum*), and 212 (8 U.S.C. §1182) (*General Classes of Aliens Ineligible to Receive Visas and Ineligible for Admission; Waivers of Inadmissibility*)).

123. Daniel C. Martin and James E. Yankay, U.S. DEP'T OF HOMELAND SEC. ANNUAL FLOW REPORT: REFUGEES AND ASYLEES 2 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/ois_rfa_fr_2012.pdf (last visited Oct. 18, 2014) [hereinafter 2012 REP.].

124. *Id.*

125. Matthew E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 HARV. INT'L L.J. 413, 421 (2006).

country.[126] Additionally, the United States government has the ability to place an admission ceiling each year on the country's overall refugee admissions.[127] This cap is determined by the United States President and the United States Congress before the start of the fiscal year.[128] Consequently, this admission ceiling and the asylum perspective of the existing administration, can strongly affect the overall asylum and refugee safeguards that the United States government offers to foreign nationals.[129]

Moreover, in 1967, the United Nations took another evolving step toward better refugee protections by enacting the *United Nations Protocol Relating to the Status of Refugees* (the 1967 Protocol).[130] The following year, the United States ratified the treaty and thus, overtly embraced the 1951 Convention's *nonrefoulment* principle of not returning aliens that would be harmed in their home countries.[131] However, the single most important piece of United States refugee legislation was not passed until 1980 when Congress enacted the *Refugee Act of 1980*.[132] In this act, the United States government promised to apply the principles of the 1967 Protocol, and to comply with its enforcement criteria which required, among other things, a geographically and politically neutral definition of the term "refugee."[133] To permit individuals to be processed, while remaining in their country of origin, this act consciously distinguished the terms "refugee" and "asylum".[134] The act mostly adopted the 1951 Convention's definition of refugee.[135] However, a key difference between the two definitions is that the *Refuge Act* added "past persecution" as a basis for meeting the definition while the 1951 Convention only required a "well-founded fear of persecution."[136] In 1995, the United States government further changed asylum procedure through the *Illegal Immigrant Reform and Immigrant Responsibility Act (ILRIRA)* by adding a one year filing period limitation to the filing of claims and limiting the review of applications in some circumstances.[137]

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126. 2012 REP., *supra* note 123, at 2.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. CRS ASYLUM REP., *supra* note 113, at 2.

132. 2012 REP., *supra* note 123, at 2.

133. *Id.*

134. *Id.*

135. Christian Cameron, *Why Do You Persecute Me? Proving the Nexus Requirement for Asylum*, 18 U. MIAMI INT'L & COMP. L. REV. 179, 182 (2011).

136. *Id.*

137. CRS ASYLUM REP., *supra* note 113, at 4.

Ten years later, the United States Congress passed the *Real ID Act of 2005* which further revised asylum and refugee law by establishing stricter standards of proof for applicants including a requirement that "an applicant's race, religion, nationality, social group, or political opinion was or will be a central motive for his or her persecution."[138] This new requirement burdened an applicant's ability to prove that they were persecuted or had a well-founded fear of persecution based on a particular social group.[139] In fact, there is a pending legislation advocating a change in this "central motive" requirement.[140] An important piece of proposed legislation is the *Refugee Protection Act*, which was introduced on March 2013 to amend the INA and remove the asylum applicant's requirement of showing "one central reason" for his persecution.[141] It also defines a particular social group as "any group whose members share a characteristic that is either immutable or fundamental to identity, conscience, or the exercise of the person's human rights such that the person should not be required to change it."[142]

Nonetheless, the world's mindset today is different than the one that inspired the United States Refugee reform in the 1980, rooted on a Cold War Communist mentality.

> The Cold War is over and political "stalemates" between great superpowers are no longer the norm. Now, "identity-based conflicts built around religion, ethnicity, nationality, race, clan, language or region" abound. These conflicts often take place within a country's border instead of on an international scale, and warring factions target civilians instead of each other. *Today's archetypical oppressor for modern refugees is not the Communist or Fascist superpower whose political goals are established, easily articulated, and clearly contrary to United States policy. Perhaps he is not even a member of a nation's government. Instead, he is a neighbor who belongs to a different tribe, a marked guerrilla soldier, or a stranger's threatening voice on the phone, and his political goals may be unclear or easily misunderstood as mere greed or prejudice* (emphasis added).[143]

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138. *Id.*

139. Melanie Nezer, *An Overview of Pending Asylum and Refugee Legislation in the U.S. Congress*, J. MIG. & HUMAN SEC., at 133, (2014), *available at* http://jmhs.cmsny.org/index.php/jmhs/article/view/28 (last visited Oct. 17, 2014).

140. *Id.* at 123.

141. *Id.* at 124.

142. *Id.* at 133.

143. Bauer, *supra* note 112, at 1087–88.

Therefore, current United States refugee and asylum policy should embrace the new "archetypical oppressor" that does not wear a political ideology mask, but hides behind a threatening phone call or an extortion letter to terrorize and harm its victims.[144] The BACRIM in Colombia have inherited the weapons of their revolutionary predecessors and adopted their *modus operandi*.[145] The BACRIM advance the paramilitaries' cycle of violence through kidnappings, rapes, death threats, and extortions, but unlike their former leaders, they do not stamp their human rights violations with the seal of political opinion.[146] As a result, current victims of violence by the hands of the BACRIM that file genuine asylum petitions in the United States simply cannot prove that they were individually targeted or that the reasons behind their attacks are on account of a statutorily protected ground.[147] Therefore, their petitions are often denied because they are unable to meet the "refugee" definition under the INA or the 1951 Convention.[148] This in turn leaves applicants of denied petitions with only one choice: to return to their home country and face torture, forceful restrains, extortion, or even death.[149] These victims cannot and should not go home, but the United States government refuses to grant them help in the form of asylum relief even though they beg for protection. This current situation regarding victims of violence in Colombia reflects a serious flaw in the United States refugee and asylum system that contravenes the *nonrefoulment* aims of the 1951 Convention since it essentially returns victims of violence to a proverbial lion's den.

B. Standards for Asylum Petitions

Presently, asylum seekers battle a harsh legal standard of proof and a discretionary system tailored to political ideologies.[150] These factors often unite and "function as a series of institutional barriers that make it extremely difficult for those who flee today's world conflicts to prevail on their asylum claims."[151] Although the United States government uses the same "refugee" definition for asylum and refugee petitions, the process for refugee status is

144. *Id.* at 1088.

145. *Immigration and Refugee Board of Canada*, *supra* note 45, at 1.

146. *Id.* at 2-3.

147. Bauer, *supra* note 112, at 1084.

148. *Id.* at 1088.

149. *Id.* at 1095–96.

150. *Id.* at 1084.

151. *Id.*

different from that of asylum status.[152] An applicant of a refugee petition is usually outside of the United States, while asylum applications are filed by people that are already inside the country or are located at a United States port of entry.[153] However, the United States President has discretion through the INA to authorize the processing of applicants that remain in their country of origin.[154] Under the INA Section 101(a)(42), to successfully substantiate a claim of asylum, the applicant must prove, with specific and credible evidence, that he is unable or unwilling to return to his country of nationality because: 1) he suffered *past persecution*, or 2) he has a *well-founded fear* of future persecution *on account of* race, religion, nationality, membership in a particular social group, or political opinion.[155] The following sections will briefly explore the two prongs of the INA asylum test to offer a glimpse of how American courts have applied the test in recent years.

1. Past Persecution

The INA and other current immigration provisions in the United States have consciously neglected to outline what constitutes "persecution" in the refugee definition.[156] Therefore, the task of defining the term has fallen to the Board of Immigration Appeals (BIA) and the federal courts of appeals.[157] Persecution is such a vital ingredient of asylum and refugee protection that "divergent definitions and understandings of persecution produce unfair results for those seeking asylum, as applicants receive disparate outcomes despite presenting claims based on similar situations."[158] To the extent that persecution is a key component of refugee protection, harm is at the core of persecution.[159] Therefore, a brief analysis of the taxonomy of harm is in order. Harm or the threat of harm is frequently invoked as the main motivator for the filing of asylum petitions.[160] "Along with an inability to seek redress from the government, harm provides the impetus for refugees to flee their home countries or fear returning, and it is harm that refugee law seeks to prevent in certain contexts."[161] In understanding persecution, it is important

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152. Drake, *supra* note 1, at 124.
153. 2012 REP., *supra* note 123, at 1.
154. *Id.*
155. § 1101 (a)(42); Sepulveda v. U.S. Att'y Gen., 401 F.3d 1126 (11th Cir. 2005).
156. Scott Rempell, *Defining Persecution*, 2013 UTAH. L. REV. 283, 283–84 (2013).
157. *Id.* at 284.
158. *Id.* at 283.
159. *Id.* at 292.
160. *Id.*
161. Rempell, *supra* note 156, at 292.

to recognize that there are various types of harm: physical harm, confinement, searches and seizures, economic harm, and psychological harm.[162]

The requirement of physical harm as a legal ground for establishing a successful asylum petition is universally accepted.[163] It is common to find allegations of beatings, sexual abuse, mutilations, or other forms of physical abuse.[164] However, types of harm such as economic and psychological are not as widely accepted as physical harm to establish persecution under the INA refugee definition.[165] Nonetheless, the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) has recognized that psychological harm like mental pain and suffering may constitute "torture," defined as harm that extends beyond physical pain.[166] As a result, federal courts have held that the persecution that qualifies an applicant for asylum can include threats to life, confinement, torture, and economic restrictions so severe that they create a real threat to life or freedom.[167]

The Ninth Circuit in *Rojas-Cortez v. Gonzalez* held that a Colombian alien suffered past persecution on account of political opinion because he received warnings from members of a right-wing military group who did not want his political party to exist.[168] He sought protection from the police, but did not receive it and was shot by a member of the right-wing party.[169] The Second Circuit in *Jaramillo v. Gonzales* also found past persecution when it held that repeated threats to an alien's life were more than mere harassment.[170] This was due to the fact that the alien had been stopped by guerillas at roadblocks and was asked to do them favors given his job as a government official.[171] Moreover, a year later, the Second Circuit in *Rios v. Mukasey* clarified that threats from guerrillas alone to a Colombian alien and her family did not constitute past persecution.[172] The Fifth Circuit adopted this same ruling in *Toro v. Ashcroft* where an applicant's petition of asylum was denied because the federal court held that threatening phone calls and

162. *Id.*

163. *Id.* at 293.

164. *Id.*

165. *Id.* at 297.

166. Rempell, *supra* note 156, at 297.

167. Shardar v. U.S. Att'y Gen., 503 F.3d 308, 312 (3d Cir. 2007).

168. Rojas-Cortez v. U.S. Att'y Gen., 125 F. App'x 897, 899 (9th Cir. 2005).

169. *Id.*

170. Jaramillo v. U.S. Att'y Gen., 222 F. App'x 35, 38 (2d Cir. 2007).

171. *Id.*

172. Rios v. U.S. Att'y Gen., 268 F. App'x 51, 54 (2d Cir. 2008).

verbal threats made by guerrillas did not rise to the level of severity that amounted to persecution.[173]

Similarly, the Eleventh Circuit in *Polanco-Brun v. U.S. Att. Gen.* held that guerrilla death threats that were not carried out nor combined with any physical injury did not constitute past persecution.[174] However, a few years earlier, the Eleventh Circuit held in *Ruiz v. Gonzalez*, that the cumulative effect of a Colombian citizen's kidnapping, physical assaults, and threatening phone calls rose to the level of past persecution.[175] The Seventh Circuit held in *Tapiero de Orejuela v. Gonzalez* that asylum applicants proved past persecution by guerrilla groups since the guerrillas made repeated attempts to extort his father who received death threats from them and was ultimately murdered for not cooperating.[176]

Nonetheless, in spite of the apparent uniformity in the application of the term "past persecution," there are many cases where federal courts, in applying their judicial discretion, have refused to acknowledge severe incidents of violence as instances that rise to the level of persecution to prove asylum relief.[177] For instance, federal courts have held that there was insufficient evidence to prove "past persecution" in cases where the alien received death threats but could not identify the perpetrator; where guerillas where sexually harassing and threatening to kill the alien's daughter; where guerillas demanded the alien to divulge membership lists of other paramilitary groups; or cases where guerrillas extorted the alien and forcibly recruited him.[178] The varying decisions of these federal courts result from the lack of a unified definition of "past persecution."[179] Federal courts perform their task of trying to define this term by weighing the factors of each petition on a case-by-case basis.[180] However, depending on the "past persecution" framework that the court adopts, the decision in each case may be different.[181] Therefore, the discretionary role of federal courts in weighing

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173. Toro v. U.S. Att'y Gen., 83 F. App'x 15, 17 (5th Cir. 2003).

174. Polanco-Brun v. U.S. Att'y Gen., 361 F. App'x 106, 108 (11th Cir. 2010).

175. Ruiz v. U.S. Att'y Gen., 479 F.3d 762, 766 (11th Cir. 2007).

176. Tapiero de Orejuela v. U.S. Att'y Gen., 423 F.3d 666, 673 (7th Cir. 2005).

177. Tracey Bateman Farrell, *Sufficiency of Evidence to Establish Alien's Past Persecution Entitling Alien to Status of Refugee under 101(a)(42)(A) of Immigration and Nationality Act of 1952: Alleged Persecution in North and South American Nations*, 4 A.L.R. FED. 2d 117, 32 (2005).

178. Ruiz v. U.S. Att'y Gen., 374 F. App'x 170, 172 (2d Cir. 2010); Serna-Arbelaez v. U.S. Att'y Gen., 278 F. App'x 9, 11 (2d Cir. 2008); Toloza-Jimenez v. U.S. Att'y Gen., 457 F.3d 155, 160 (1st Cir. 2006); Lopez v. U.S. Att'y Gen., 192 F. App'x 19, 22 (1st Cir. 2006).

179. Rempell, *supra* note 156, at 284.

180. *Id.*

181. *Id.*

some factors more heavily than others has resulted in the denial of many Colombian asylum petitions due to a failure to prove past persecution under the refugee definition.[182]

2. Well-Founded Fear

There is not a clear definition of the term "well-founded fear."[183] However, in *INS v. Cardoza-Fonseca*, the United States Supreme Court concluded that "[t]here is some ambiguity in a term like 'well-founded fear' which can only be given concrete meaning through a process of a case-by-case adjudication."[184] Once an applicant has successfully shown evidence of past persecution, a presumption of a "well-founded fear" is created.[185] As a result, the immigration service agency now has the burden to show exceptions to rebut that presumption and support a denial of asylum even though the applicant meets the refugee definition.[186] The government can show that either: 1) a fundamental change in circumstances has occurred so as to vitiate the well-founded fear or that 2) the applicant can avoid future persecution by relocating to another part of his country of origin.[187] Nonetheless, even if either or both of these exceptions are met, the applicant can still be granted asylum. The applicant has to show that he has compelling reasons for being unwilling or unable to return to his country of origin, or he establishes that there is a reasonable possibility that he will face harm in his home country.[188]

Moreover, following the Supreme Court's ruling in *Cardoza-Fonseca*, the BIA implemented new guideless that required applicants to show both an objective and subjective component to prove that their fear was well-founded.[189] In essence, the applicant has to show that his fear was: 1) subjectively genuine and 2) objectively well-founded.[190] The subjective element requires the applicant to demonstrate that he actually holds a fear of persecution.[191] Whereas the objective standard inquires as to the reasonableness of the applicant's fear of persecution by requiring him to

182. *Id.*

183. Bauer, *supra* note 112, at 1089.

184. *Id.*

185. Price, *supra* note 125, at 461.

186. *Id.*

187. 8 C.F.R. § 208.13(b)(i)(A)(B).

188. § 208.13 (b)(iii)(A)(B).

189. Bauer, *supra* note 112, at 1089.

190. *Id.*

191. *Id.*

show direct evidence of a specific threat.[192] The objective requirement heightened the asylum standards of proof and became a barrier to many victims of violence receiving asylum protection. These victims are rarely able to prove their persecution through "credible, direct, and specific evidence."[193] In fact, "[w]hen an individual flees past persecution, he rarely has the time or resources to collect and carry evidence validating the persecution or fear."[194] Sometimes that evidence may not even exist or be available, especially when the oppressor acts in a covert manner.[195] Given the nature of today's violent conflicts, the requirement to show specific evidence of fear is unrealistic.

3. Protected Grounds: The "on account of" Requirement

The INA and the 1951 Convention recognize five protected grounds—race, religion, nationality, social group, or political opinion—in determining asylum protection.[196] "Applicants must be able to show a nexus between the persecution and one of [the] protected grounds in order to qualify as refugees."[197] This section will only discuss persecution on account of membership to a particular social group and political opinion.[198] These too are the most applicable grounds of persecution to Colombian victims of violence.[199]

a. Membership to a Particular Social Group

Only a small fragment of the asylum petitions filed in the United States involve claims of persecution based on a protected ground of membership to a particular social group.[200] There is no specific definition of what a social group entails in this matter.

> Some of the classifications that have been argued as "social groups" include taxi drivers, the military, the educated elite, hereditary chiefs of the Esubete people, young working class males of military age, the social circle of Imelda Marcos, large

192. *Id.*

193. *Id.*

194. Bauer, *supra* note 112, at 1090.

195. *Id.*

196. Cameron, *supra* note 135, at 182.

197. *Id.* at 180.

198. Asuncion, *supra* note 9, at 443.

199. *Id.*

200. Fullerton, *supra* note 118, at 541.

landowners, cheese makers, families, women previously raped and beaten by guerrilla forces, and homosexual men.[201]

As of today, federal courts have recognized the educated elite and their families as a social group within the meaning of the *Refugee Act of 1980*.[202] Federal courts have struggled with establishing a definition of the term "social group."[203] In *Matter of Acosta*, the BIA held that a particular social group consists of individuals that share "common immutable characteristics" such as sex, color, kinship ties, or a shared past.[204] They could also share a characteristic that is not immutable but it is so vital to their identity that they cannot change it.[205] In *Ananeh-Firempong*, the First Circuit conceptualized a social group as people that share "similar backgrounds, habits, or social status."[206] In *Sanchez-Trujillo v. I.N.S.*, the Ninth Circuit held that a particular social group was a voluntary associational relationship in which its members share common characteristics, or interests that are fundamental to a person's identity.[207] In *Gomez v. I.N.S.*, the Second Circuit adopted a broad definition and recognized that a social group had to be perceived as a recognizable and discrete group in society where its members shared a fundamental characteristic that differentiates them from the rest of the world.[208]

An applicant's likelihood of proving the "particular social group" requirement decreases because of the absence of a clear and uniform definition under the 1951 Convention and the INA.[209] This decrease in likelihood is mainly due to the exercise of judicial discretion of federal courts by adopting disparate frameworks that define the term in varying ways and yield contrary rulings.[210] This discretionary practice is also seen in the efforts of federal courts and the BIA to define "persecution" under the INA.[211] As a result, the exercise of discretion of federal courts further affects an applicant's ability to prevail on his asylum petition because they often cannot

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201. *Id.* at 541-43.

202. *Id.* at 549, 554.

203. *Id.* at 531.

204. Acosta, 19 I. & N. Dec. 211, 212 (1985).

205. *Id.* at 233.

206. Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985).

207. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986).

208. Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991).

209. Fullerton, *supra* note 118, at 524.

210. *Id.* at 543.

211. *Id.* at 545.

produce the requisite direct and clear evidence that supports their claim.[212] "Refugees . . . face difficulty proving persecution because their persecutors may not articulate the reasons for inflicting harm, and evidence can be difficult to obtain."[213] Therefore, many applicants are unable to satisfy the present harsh standard of proof of a persecution claim based on their membership to a particular social group. They are unable to show that the harm they suffered was "on account of" their membership to a particular social group.

b. Political Opinion

Federal courts and the BIA have tried to shape the definition of "political opinion" as a protected ground since the term is not statutorily defined.[214] In *Matter of Sanchez & Escobar*, the BIA defined a political opinion as a viewpoint held by an individual that the persecutor seeks to overcome.[215] In order to have a valid well-founded fear based on political opinion grounds, federal courts have held that the perpetrator must know of the political opinion or impute the opinion to the alien.[216] In 1992, the Supreme Court further clarified the concept of "political opinion" in *I.N.S. v. Elias-Zacarias*.[217] The court held that a guerilla's coercion does not constitute persecution on account of political opinion because neutrality does not constitute political opinion for asylum purposes.[218] In this case, Guatemalan guerrillas coerced the alien into joining them, but he refused.[219] The guerrillas promised to return and retaliate, so the alien left the country and fled to the United States.[220]

In addition to refusals to join a revolutionary group, federal courts have also determined that the following scenarios do not qualify as grounds for political opinion:

> kidnappings, refusals to pay war taxes, refusals to help a criminal group with a bank scheme, receiving fifty threatening telephone calls, publicly speaking out against the alien's own country, being

212. Nezer, *supra* note 139, at 133.

213. *Id.* (footnote omitted).

214. Asunción, *supra* note 9, at 443.

215. Sanchez & Escobar, 19 I. & N. Dec. 276, 283 (1985).

216. Asunción, *supra* note 9, at 443.

217. INS v. Elias-Zacarias, 502 U.S. 478, 486–87 (1992).

218. *Id.* at 478.

219. *Id.* at 483.

220. *Id.* at 480-81.

> threatened due to the public opposition against the government of the alien's father, being unable to prove that the group that killed the alien's father, briefly kidnapped the alien, and beat the alien's stepmother was part of a group that the government was unwilling or unable to protect her from, and lastly, being gang-raped due to the political views of the alien's boyfriend.[221]

Therefore, the modern conception of the term "political opinion" is under-inclusive. It essentially excludes victims that are in genuine peril simply because their oppressors do not openly advertise the political motivations behind their crimes.

C. *Process of Requesting Asylum*

Unlike the process for acquiring refugee status in the United States which empowers the executive branch to define the process of refugee admission each fiscal year, the framework to request asylum protection is thoroughly outlined in Section 208(a)(1) of the INA.[222] This section first recognizes that asylum protection is awarded to a noncitizen residing in the United States at the time of the filing of the petition or located at a United States port of entry, irrespective of the alien's immigration status.[223] This part of the article explores the process that applicants must undergo to successfully submit an asylum petition. Part 1 presents the general process of filing asylum claims and the various types of asylum relief available. Part 2 discusses the individual asylum application process of Colombian victims of violence in the United States and some of the challenges they face in filing their applications.

1. Filing of Claims

Asylum relief in the United States can be granted in one of three forms: an affirmative asylum petition, a defensive petition during removal proceedings, or a derivative asylum petition.[224] Although these asylum avenues differ mainly on whether the applicant is facing removal

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221. *See* Movsesyan v. U.S. Att'y Gen., 394 F. App'x 896, 900 (3d Cir. 2010); Orozco v. U.S. Att'y Gen., 323 F. App'x 734, 736 (11th Cir. 2009); Cardozo-Rodriguez v. U.S. Att'y Gen., 300 F. App'x 765, 767 (11th Cir. 2008); Cantave v. U.S. Att'y Gen., 295 F. App'x 327, 329 (11th Cir. 2008); Boisziau v. U.S. Att'y Gen., 313 F. App'x 197, 198 (11th Cir. 2008); Garcia v. U.S. Att'y Gen., 217 F. App'x 855, 856 (11th Cir. 2007); Hurtado v. U.S. Att'y Gen., 136 F. App'x 331, 333 (11th Cir. 2005); Purveegiin v. INS, 73 F. Supp. 2d 411, 413 (S.D.N.Y. 1997).

222. Drake, *supra* note 1, at 124.

223. § 1158(a)(1).

224. 2012 REP., *supra* note 123, at 4.

proceedings, they employ the same legal standards to determine asylum eligibility.[225] The applicant has the burden to prove that he qualifies as a "refugee" under the INA definition.[226] He must ensure a favorable grant of asylum by an asylum officer or an immigration judge depending on the type of petition.[227] However, this favorable grant of asylum only endorses the fact that the applicant is eligible to submit the application, but it does not guarantee that asylum relief will be granted.[228]

a. Affirmative Asylum Petitions

Within one year of arriving in the United States, an applicant must file an affirmative petition with an officer of the United States Citizenship and Immigration Services (USCIS), or be able to show that an exception based on extraordinary circumstances applies to him.[229] The latter alternative allows the delayed filing of a petition.[230] To file an affirmative petition, the applicant must not be involved in removal proceedings, and must actively seek asylum.[231] It is important to note that Colombia is among the six most frequent nations of origin of affirmative asylum seekers.[232]

To apply for affirmative asylum, the applicant must file with the USCIS an I-589 Form known as an *Application for Asylum and for Withholding of Removal*.[233] The I-589 Form must be completed in English and it requires the applicant to provide a detailed and substantial account of his claim of persecution.[234] For example, the form directs each applicant to provide exhaustive information regarding the applicant's "identity, family relationships, education, employment, travel, and reasons for fearing persecution or torture in her home country."[235] It also requires that the applicant explain his political, religious, and ethnic affiliations.[236] He must

225. *Id.*

226. CRS ASYLUM REP., *supra* note 113, at 6.

227. Drake, *supra* note 1, at 125.

228. Yang v. INS, 79 F.3d 932, 935 (9th Cir. 1996).

229. 2012 REP., *supra* note 123, at 4.

230. *Id.* (It is important to note that the term "affirmative" highlights the proactive nature of this type of application).

231. *Id.*

232. Philip G. Schrag et al., *Rejecting Refugees: Homeland's Security's Administration of the One-Year Bar to Asylum*, 52 WM. & MARY. L. REV. 651, 696 (2010).

233. 2012 REP., *supra* note 123, at 4.

234. Schrag et al., *supra* note 232, at 662–64.

235. *Id.* at 662.

236. *Id.*

Table 1
Colombian Affirmative and Defensive Asylum Petitions Granted in the United States from 2003 to 2012[257]

Year	Colombian Affirmative Asylum Granted	Colombian Defensive Asylum Granted	Overall United States Affirmative & Defensive Asylum Granted
2003	2968	1590	28,743
2004	2900	1473	27,362
2005	2214	1151	25,248
2006	2178	782	26,259
2007	1490	683	25,219
2008	1113	548	22,973
2009	636	368	22,225
2010	358	234	21,084
2011	325	213	24,873
2012	340	131	29,484

c. Derivative Asylum Petitions

Derivative asylum petitions are requests for protection presented by, either a spouse or an unmarried child under the age of twenty-one of the principal asylee.[258] A principal asylee is the person that possesses asylum relief independently at the time of the filing of the derivative petition.[259] The spouse or child must be listed on the original petition for asylum because although they did not receive a grant of asylum protection, they can still derive it from the principal asylee's grant of asylum.[260] The principal asylee must file an I-730 Form for each person that he seeks to include under his asylum coverage.[261] The principal asylee can request public benefits like a travel visa, employment assistance, a social security card, or social services for his beneficiaries in the United States or abroad.[262] The principal asylee has up to two years to request these benefits so long as the relationship

257. *2012 Yearbook of Immigration Statistics*, DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS (July 2013), *available at* http://www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf (last visited Oct. 17, 2014) [hereinafter *2012 Yearbook*].

258. 2012 REP., *supra* note 123, at 4.

259. *See id.*

260. *See id.*

261. *Id.*

262. *Id.*

between the applicant and the principal asylee existed prior to the grant of asylum relief.[263]

2. Colombian Asylum Claims: "The Colombian Formula"

In considering whether to grant asylum protection to Colombian victims of violence, it is worth noting that although "most Colombians have legitimate claims of asylum based on politically motivated brutality, displacement and loss of livelihood," other Colombians attempt to use the suffering of these victims to gain asylum in the United States for themselves.[264] These astute applicants resort to claims of political persecution to obtain asylum when in reality they flee to the United States due to economic reasons.[265] These individuals follow what amounts to a road map or *formula* in hopes of achieving a grant of asylum.[266] They usually claim that politically motivated groups persecuted them due to their political views, line of work, connection to family members that have been victims of previous persecution, personal lifestyle, or their membership on a victimized indigenous group.[267] Since their frivolous allegations are difficult to substantiate, they resort to producing false documents and testimonies regarding their persecution.[268] These individuals submit their fraudulent applications essentially relying on the following facts:

> [A]sylum officers are pressured by a large case load, are unfamiliar with the current conditions of the conflict in Colombia, are unaware of the actual geographic areas of conflict in the country where the displacement occurs, and are uninformed of the current connections of new criminal bands with paramilitary and guerrilla groups.[269]

The INA specifically provides under Section 208(d)(6) of the act regarding frivolous and fraudulent applications that:

> If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received

263. 2012 REP., *supra* note 123, at 4.

264. Luz E. Nagle, *Colombian Asylum Seekers: What Practitioners Should Know about the Colombian Crisis*, 18 GEO. IMMIGR. L.J. 441, 451 (2004) [hereinafter *Colombian Asylum Seekers*].

265. *Id.* at 460.

266. *Id.*

267. *Id.*

268. *Id.* at 463.

269. *Colombian Asylum Seekers*, *supra* note 264, at 463.

> the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this Act, effective as of the date of a final determination on such application (emphasis added).[270]

Even though some individuals may use the pain of these victims as their own ticket to United States protections and social benefits, public policy demands a more careful review of the asylum petition process, but not the establishment of stricter standards of proof to deter frivolous claims. The suffering and the struggle of these victims of modern conflict by the BACRIM is authentic and hostile.[271] Denying petitions by implementing harsher legal requirements will be a futile effort and will not deter frivolous petitions. This type of applicant will continue to use false documentation to meet the legal standard to substantiate their asylum claims. The better approach is focused on the current procedure for an application review. The United States government should focus on decreasing the case load and increasing the time allocated for the review of petitions, so that asylum officers are better able to detect discrepancies and red flags on suspicious applications.

Additionally, asylum officers should be better educated on guerrilla and paramilitary activities in the geographic region that the applicant claims he was persecuted.[272] Asylum officers should also be given a list of common signs or red flags on applications for cases in which the persecution is on account of street gang violence and not due to political motivation.[273] Lastly, asylum officers should inquire as to whether the applicant was coached or advised by someone in Colombia or in the United States in order to determine any knowledge that he may have regarding the Colombian asylum *formula*.[274] This step is particularly important because during the interview the applicant is under oath and could face penalties for perjury.[275] Genuine victims of the violence in Colombia should not pay the price of harsher standards of proof in order to deter frivolous claims made by other applicants who use their stories as a template for their own selfish motives. The current standard of proof to prevail on an asylum claim already poses a challenge for victims of violence because they are often unable to show past persecution on account of a protected ground or a well-founded fear of persecution. Thus, enhancing the present legal standard will not deter frivolous asylum claims,

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270. 8 U.S.C. § 1158(d)(6) (2009).

271. *See Colombian Asylum Seekers*, *supra* note 264, at 465

272. *Id.* at 464.

273. *Id.*

274. *Id.* at 465.

275. *See* Schrag et al., *supra* note 232, at 64.

but will instead continue the abuse already suffered by victims of violence that file genuine petitions of asylum.

V. ANALYSIS OF ALTERNATIVE REMEDIES TO FAILED PETITIONS OF ASYLUM

A. Discussion of Alternative Remedies

Asylum protection is only one way that foreign states can help persecuted victims of violence to flee their country of persecution by providing them shelter and aid. However, an outpour of victims of violence and asylum seekers in the last twenty years, along with increased domestic pressure to constrain asylum protections have caused nations to erect barriers for refugees entry.[276] These barriers are materialized in the introduction of the following:

> [o]nerous procedural requirements that reduce the number of people eligible for asylum, in reductions of public benefits offered to applicants while their asylum petitions are pending, in detentions of applicants in facilities with common criminals while their petitions are under review, and in the acceleration of the application determination process which in turn reduces the time that applicants have to collect supporting evidence for their claims.[277]

Particularly, in the United States, the strict legal requirements to successfully meet the "refugee" definition under the INA and the additional procedural requirements to qualify for a grant of asylum make it very difficult for Colombian victims of modern violence to receive this protection. If the BIA and the United States Federal Courts adopt the narrow view that asylum has a greater political foundation than a humanitarian one, and thus, the protection should be strictly construed to apply only to victims of political violence, there are alternative protections for victims of modern violence. The 1951 Convention and the INA adopt a *nonrefoulment* approach prohibiting the return of victims of violence to home countries where they will be harmed.[278] However, refugee determinations and political asylum adjudications still exclude a large number of individuals who are in genuine

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276. Price, *supra* note 125, at 414.

277. *Id.*

278. Donald Kerwin, *Creating a More Responsive and Seamless Refugee Protection System: The Scope, Promise and Limitation of US Temporary Protection Programs*, 2 J. Mig. & Human Sec. 44, 48-49 (2014) [hereinafter *TPS Response*].

peril simply because they cannot meet the statutory "refugee" definition.[279] Therefore, temporary protection programs "should be used to safeguard persons who are in substantial peril and who do not meet the refuge standard or who cannot avail themselves of the refugee determination process."[280] This following section discusses some of those temporary protection programs that serve as alternatives to political asylum.

1. Withholding of Removal

Under Section 241(b)(3) of the INA, the United States government has allowed protection to individuals fleeing persecution.[281] The statute states that "if the applicant is found to be ineligible for asylum under either section 208(a)(2) or 208(b)(2) of the Act, the applicant shall be considered for eligibility for withholding of removal under section 241(b)(3)."[282] Unlike asylum protection that subjects the applicant to a one-year filing period, a withholding of deportation or removal is a compulsory form of relief that entitles the applicant to protection so long as he satisfies the statutory requirements.[283] These requirements include: a) meeting the standard of proof of a withholding of removal claim and b) overcoming any bars to eligibility for withholding of removal.[284]

a. Standard of Proof: "A Clear Possibility of Persecution"

First, to successfully prove a claim for a withholding of removal, the applicant must show that if he is deported to his country of origin, his life and liberty would be at risk.[285] The United States Supreme Court in *INS v. Stevic* interpreted this concern to mean that an applicant had to show "a clear probability of persecution" by the government or a group that the government was unwilling or unable to contain on account of a protected ground to avoid deportation.[286] The Court also suggested, in dicta, that the standard of proof

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279. *Id.*

280. *Id.* at 46 (footnote omitted).

281. *See* 8 U.S.C § 1231(b)(3) (2012).

282. § 208.13(c)(1).

283. *Pro Bono Asylum Presentation Manual Section III: Alternatives to Asylum*, THE ADVOCATES FOR HUMAN RIGHTS (2008), at 59, *available at* http://www.theadvocatesforhumanrights.org/uploads/pro+bono+asylum+representation+manual+2009.pdf (last visited October 15, 2014) [hereinafter *Pro Bono Asylum*].

284. *Id.* at 250.

285. Case Comment, *INS v. Elias-Zacarias: Political Asylum, "Plain Meaning," and the Labyrinth of Formalism*, 24 U. MIAMI INTER-AM L. REV. 467, 475 (1993).

286. INS v. Stevic, 467 U.S. 407 (1984).

show a derivative claim to a spouse, parent, or unmarried child that has already received asylum, or has been resettled as a refugee.[303] Refugees are typically entitled to receive public benefits including cash and medical aid, job placement, and other social services including social security income (SSI) benefits.[304] However, they must become citizens within seven years of their arrival to the United States to maintain their eligibility for SSI benefits.[305]

In recent years, the overall number of refugees that have arrived to the United States has not met the overall number of spots available for them each fiscal year.[306] The United States has particularly refused to admit more Colombian refugees to the country even though it had the available spots to do so.[307]

Table 2
Colombian Refugee Arrivals in the United States from 2003 to 2013[308]

Year	Overall United States Refugee Available Spots	Overall United States Refugee Arrival	Colombian Refugee Arrival
2003	70,000	28,403	149
2004	70,000	52,873	577
2005	70,000	53,813	323
2006	70,000	41,223	115
2007	70,000	48,218	54
2008	80,000	60,107	94
2009	80,000	74,602	57
2010	80,000	73,293	123
2011	80,000	56,384	46
2012	76,000	58,179	126

303. *Id.*

304. Nezer, *supra* note 139, at 138.

305. *See id.*

306. *2012 Yearbook, supra* note 257; KELLY JEFFERYS AND DANIEL C. MARTIN, U.S. DEP'T OF HOMELAND SEC. ANNUAL FLOW REPORT: REFUGEES AND ASYLEES (2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2007.pdf (last visited Oct. 17, 2014) [hereinafter *Refugees and Asylees*].

307. *2012 Yearbook, supra* note 257; *Refugees and Asylees, supra* note 306.

308. Drake, *supra* note 1, at 139; *2012 Yearbook, supra* note 257, at 39 & 40.

2013	70,000	69,927	230

Nonetheless, under current refugee law, Colombian victims of violence still living in Colombia can petition the United States government or the UNHCR for refugee protection as an alternative option to asylum protection.[309]

3. Parole Power of the Attorney General

Prior to the Refugee Act of 1980, the Attorney General was given the power to grant "parole" or temporary permission to be in the United States to non-citizens that were either inside or outside of the country.[310] This discretionary refugee protection was mostly intended to benefit victims of conflicts caused by Communism.[311] Although the parole power is not usually invoked for refugee admission, current United States immigration, asylum and refugee legal provisions still acknowledge this discretionary power. The parole power could be invoked for victims of violence who do not qualify for either asylum or resettlement relief.[312] These victims of modern conflicts can appeal to the United States Attorney General under Section 208 (b)(1)(iii) of the INA to grant them asylum or parole protections in the absence of a statutorily "well-founded fear" of persecution.[313] This section suggests that if the applicant can show: a) compelling reasons for being unable or unwilling to return to his country of persecution or b) a reasonable possibility that he may suffer other serious harm if he returns, then the decision-maker, namely the Attorney General, can use his discretion to grant protection to the applicant.[314] Prospective parolees must first exhaust other legal immigration alternatives before requesting parole protection.[315]

4. Legal Immigration Status through Immigration Visas

Victims of violence face various forms of persecution. One of those forms can be sexual threats or harassment.[316] These threats are often paired with extortion, death threats, and physical abuse to the victim.[317]

309. *See* Price, *supra* note 125, at 429.

310. Drake, *supra* note 1, at 123.

311. *Id.*

312. § 208.13.

313. § 208.13(b)(1)(iii).

314. *Id.*

315. TPS Response, *supra* note 278, at 52.

316. § 1101(a)(15)(U)(iii).

317. *Id.*

Nonetheless, the United States government through the *Victims of Trafficking and Violence Protection Act of 2000* (Protection Act of 2000) created a new type of visa to protect these types of victims.[318] The "T" Visa protects victims who would not qualify under other forms of immigration protection.[319] This act includes victims of sex trafficking, individuals that have been recruited for "labor services, involuntary servitude, slavery or debt bondage through the use of force, fraud, or coercion."[320] The act provides 5000 available spots each year for victims of this abuse, and provides that the victims be eligible for certain public benefits.[321] Another type of visa created by the Protection Act of 2000 is the "U" Visa.[322] These immigration visas are awarded to victims of violence that have helped law enforcement in the investigation or prosecution of the criminal bands that harmed them.[323] Some of the crimes that qualify under the "U" visas include rape, torture, trafficking, stalking, being held hostage, kidnapping, abduction, unlawful criminal restraint, blackmail, extortion, manslaughter, murder, and felonious assault.[324]

Altogether, applicants for asylum that are victims of the modern internal conflict caused by the BACRIM who assault, kidnap, extort, murder, and terrorize civilians in Colombia may request legal immigration status in the United States through these visas while remaining in the zone of conflict. Although there is a cap for the number of visas that will be awarded each fiscal year, these victims of violence can turn to this permanent remedy in the event that they are unable to meet the "refugee" definition of the INA or the 1951 Convention.[325]

5. United Nations Convention Against Torture Relief (CAT)

Unlike victims of violence that apply for asylum or resettlement, noncitizens that file claims of relief from removal on account of torture are subject to different proceedings.[326] Victims of torture are processed pursuant to the CAT.[327] The INA under Section 208.16-17 provides two distinct

318. *Pro Bono Asylum*, *supra* note 283, at 66.

319. *See id.*

320. *Id.*

321. *Id.*

322. *Id.* at 67.

323. *Pro Bono Asylum*, *supra* note 283, at 67.

324. § 1101(a)(15)(U)(iii).

325. 2012 REP., *supra* note 123, at 2.

326. CRS ASYLUM REP., *supra* note 113, at 12.

327. *Id.*

protections under the convention: 1) withholding of deportation, and 2) deferral of removal.[328]

In order to establish the torture element of the claim, the applicant must prove that:

> 1) The torture involved the infliction of severe pain or suffering (physical or mental);
> 2) The torture was intentional; and
> 3) The torture was committed by either a public official or with the consent of a public official.[329]

In *Matter of J-E*, the BIA interpreted the term "torture" to mean an extreme form or cruel and inhumane punishment that does not extend to "lesser forms of cruel, inhumane, or degrading treatment or punishment."[330]

The CAT has a more severe standard of proof than an asylum claim.[331] Under Article 13 of the CAT, the applicant must also show "more likely than not" that he will be subject to torture if he is returned to the country of persecution.[332] Therefore, Colombian victims of modern violence that have potential CAT claims should raise them in the alternative to their petition of asylum. A Colombian applicant for asylum should include in his I-589 asylum petition his CAT claim along with any supplemental information showing the human rights abuses that he endured in his country.[333] CAT relief is not as beneficial as asylum relief, but it will offer these victims of violence an alternative forum in which they can seek international shelter from their oppressors.

6. Temporary Protected Status (TPS)

The United States has afforded TPS to hundreds of individuals that have been the victims of humanitarian catastrophes or violent conflicts under the *Immigration Act of 1990*.[334] The Act gave the Attorney General the power to confer this protection for set periods of time, which usually amounts to six

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328. *Pro Bono Asylum*, *supra* note 283, at 60.

329. CRS ASYLUM REP., *supra* note 113, at 12.

330. In re J-E, 23 I. & N. Dec. 291 (2002).

331. *Pro Bono Asylum*, *supra* note 283, at 62.

332. CRS ASYLUM REP., *supra* note 113, at 12-13.

333. *Pro Bono Asylum*, *supra* note 283, at 62.

334. Claire Bergeron, *Temporary Protected Status after 25 Years: Addressing the Challenge of Long Term "Temporary" Residents and Strengthening a Centerpiece of US Humanitarian Protection*, J. MIG. & HUMAN SEC. (2014), at 23-25, *available at* http://jmhs.cmsny.org/index.php/jmhs/ article/view/23 (last visited June 7, 2014).

to eighteen months.[335] It is worth highlighting the transitory nature of this protection tool because once the Attorney General determines that the conflict or disaster in the home country has been resolved, TPS applicants are given a Notice to Appear and are placed in removal proceedings.[336] Therefore, TPS relief does not render the applicant able to receive legal permanent resident status, it merely provides the victim with a short-term shelter.[337]

In determining if the applicant qualifies for TPS, the Attorney General considers: "whether the home country of the applicant is experiencing ongoing armed conflict, natural disasters, or extraordinary circumstances; whether returning the applicant would put him in danger; and whether granting him TPS would be in the nation's interest."[338] For purposes of the present discussion, TPS is not an available option for Colombian victims of violence because this nation is not listed as a TPS country.[339] In order for an individual to receive TPS, the Secretary of Homeland Security must first designate the home country of the applicant as being unable to address the return of foreign nationals.[340] As of May 2014, the only countries designated for TPS were El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan, and Syria.[341] Therefore, Colombian victims of violence by the hands of BACRIM groups are not eligible for this protection tool until the United States Department of Homeland Security lists Colombia as a designated country for TPS relief.

7. Voluntary Departure

Applicants who do not qualify for any of the previously discussed remedies may consider voluntary departure as a remedy of last resort.[342] Voluntary departure is outlined under Section 240(B)(c) of the INA.[343] The statute permits an individual that would have been deported, to return to his own country at his own volition within a designated amount of time.[344] This protection tool often appeals to noncitizens that face deportation because it

335. *Pro Bono Asylum*, *supra* note 283, at 65.

336. *Id.*

337. *See id.*

338. Asunción, *supra* note 9, at 458–59.

339. *Pro Bono Asylum*, *supra* note 283, at 65.

340. *Id.*

341. *Id.*

342. *Pro Bono Asylum*, *supra* note 283, at 63.

343. *Id.*

344. *Id.* at 65.

avoids the issuance of a final departure order, which could prevent them from re-entering the United States in the future.[345] However, in the case of Colombian victims of violence, voluntary departure is an imperfect protection tool because the main concern of these victims is their inability to return home.[346] Therefore, they are in need of a more permanent protection mechanism that provides them with a shelter outside of their home country.

Lastly, it is important to note that there are several other immigration remedies available to victims of violence including the *Violence Against Women Act* (VAWA), which provides protection against removal on account of domestic violence.[347] However, this article limits its scope to alternatives that are relevant to violence perpetrated not by individuals, but by criminal groups like the BACRIM in Colombia who continue the human rights abuses of their predecessors.

VI. CONCLUSION

In 1984, the *Cartagena Declaration* enlarged the "refugee" definition of the 1951 Convention to include persons whose "lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights, or other circumstances that have seriously disturbed public order."[348] Similarly, the United States should expand the definition of "refugee" to recognize the new "archetypical oppressor" of the modern conflict in Colombia that hides behind a veil of greed and criminal activity, but fails to openly profess their political motivations. This creates the ideal *modus operandi* to inflict pain and terror on civilians, dispose them of their livelihood, and strip them of their safety, while they remain in the shadows of a "gang violence" label that shields their activities from being recognized as "persecution" under the INA or the 1951 Convention. Currently, Colombian victims of violence face this genuine peril and are forced to flee their homeland without protection from their government. Upon arriving in the United States, they request government protection in the form of asylum, but their petitions are often denied. These victims cannot go home and are in desperate need of protection. To them, the international community is their last resort.

Colombian victims of violence, nonetheless, should know that there is hope for them in the form of temporary protection programs. Awareness of these protection tools can encourage candidness in the application process and discourage the filing of frivolous asylum applications. It can also lead

345. *Id.* at 63.

346. *See id.*

347. *Pro Bono Asylum*, *supra* note 283, at 63.

348. TPS Response, *supra* note 278, at 52. (The Cartagena Declaration was signed in Cartagena, Colombia and approved by ten other nations as well as the Organization of American States (OAS)).

to more accurate petition filings and a substantial decrease in the numbers of failed petitions and USCIS appeals. However, these programs are not intended to be viewed as a replacement to asylum petitions, but as temporary alternative forms of assistance for victims of violence that would otherwise be forced to return to their country of oppression.